

IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO: 9(15)/4-1436/06

BETWEEN

ANUAR BIN MAT ISA

AND

CAHAJAYA TIMBER INDUSTRIES SDN. BHD.

AWARD NO. : 965 OF 2010

Before : Y.A.TUAN MOHD. AMIN FIRDAUS BIN ABDULLAH
CHAIRMAN

Venue : INDUSTRIAL COURT OF MALAYSIA
PENANG BRANCH

Date of Reference : 15th OF MARCH 2006

Dates of Mention : 17.8.2006, 11.1.2007, 6.2.2007, 6.3.2007, 6.4.2007,
8.5.2007, 18.6.2007, 22.8.2007, 24.10.2007,
26.11.2007, 11.12.2009, 16.12.2009 & 5.2.2010.

Date of Hearing : 30th OF MARCH 2009 & 31st OF MARCH 2009.

Representation : Mr. Moses Singam from Timber Employees Union
Peninsular Malaysia for the Claimant.

Mr. Leow Tat Fah, the learned Counsel from Messrs
TF Leow & Associates for the Respondent.

Reference :

The reference of the Honourable Minister of Human Resources Malaysia is regarding the dismissal of Encik Anuar Bin Mat Isa ("the Claimant") by Cahajaya Timber Industries Sdn. Bhd. ("the Company") on 4th of March 2003.

AWARD

This case was referred by the Honourable Minister of Human Resources vide his reference dated 15th of March 2006 and received by the Court on 12th of July 2006. This pertains to the dismissal of Encik Anuar Bin Mat Isa by Cahajaya Timber Industries Sdn. Bhd.(“the Company”) on 4th of March 2003.

Background:

This case was heard before Y.A.Tuan Mohd. Amin Firdaus Bin Abdullah on 19th of January 2009 and it was completed on 31st of March 2009. However the said Chairman was elevated to the post of Judicial Commissioner of the High Court of Malaya with effect from 15th of August 2009.

The Counsel for the Claimant filed his Written Submission on 6th of May 2009 while Company's Counsel did file her Written Submission on 2nd of July 2009. It is to be noted on 5th of March 2010 both parties had given their consent and did not object for this award to be handed down by another Chairman of the Industrial Court. On that date also the Court was

informed that the Counsel for the Claimant did file his written reply on 21st of July 2009.

It is pertinent to note that after perusing through the notes of evidence and the submission by the parties, the Court does not find any problem in handling down the award, as the issue is straight forward, plain and clear.

Brief facts:

In this case the Claimant commenced employment with the Company as Chargehand on 3rd of October 1993 and was subsequently confirmed in the said post on 1st of November 1993 in the Lamination Section.

The Claimant while in service with the Company was an active member of the Timber Employee Union Peninsular Malaysia, as he was serving as Secretary of the Worksite Protem Committee.

Pursuant to the incident which happened on 29th of January 2003 the Company had issued a show cause letter dated 4th of February 2003 to the Claimant to offer him the opportunities to explain the five(5) charges levelled against him, namely on the Claimant's abusive unruly and aggressive behavior.

Vide his letter dated 5th of February 2003, the Claimant had replied to the Company's said Show Cause Letter.

As the explanations preferred by the Claimant were unsatisfactory wanting and represent more deniels to deflect the serious charges brought against him, the Company had proceeded to inform the Claimant to attend a Domestic Inquiry on 22nd of February 2003 vide its letter dated 19th of February 2003.

The Company had proceeded to conduct the Scheduled Domestic Inquiry on 22nd of February 2003 which lasted till 26th of February 2003.

After the Panel of the Domestic Inquiry had gone through the evidence, documents and hearing of the witnesses, the Penal had found that the Claimant was guilty of all the charges and recommended termination of the Claimant's employment.

Vide letter dated 4th of March 2003 the Company had informed the Claimant that his employment had been terminated with effect from the date of the said letter. His last drawn salary was RM766.50 permonth.

For ease of reference the letter is reproduced as below:

CAHAJAYA Timber Industries Sdn. Bhd.

Lot 96 & 97, Kawasan Perindustrian Bakar Arang, 08000 Sungai Petani, Kedah, Malaysia.
Tel: +604-4221677/8/9 Fax: +604-4221699 & 4214222 (Direct) Email: gohalai@pc.jaring.my

4.03.2003

Anuar Bin Mat Isa
1294, Lorong Teja 27,
Taman Keladi,
08000 Sungai Petani,
Kedah Darul Aman.

Encik Anuar,

Merujuk kepada siasatan dalaman yang diadakan pada 22hb Februari 2003 hingga 26hb Februari 2003, saudara telahpun di beri peluang untuk

membela diri dan ahli Panel telahpun mendapati anda bersalah. Maka dengan ini pihak Syarikat membuat keputusan untuk memberhentikan perkhidmatan saudara.

2. Tarikh akhir perkhidmatan saudara adalah mengikut tarikh surat ini. Segala pembayaran yang tertunggak akan dimasukkan ke dalam bank akaun saudara.

Sekian terima kasih.

Yang menjalankan tugas,
Cahajaya Timber Industries Sdn. Bhd.

.....tdtgn.....
Goh Aik Lai
Managing Director

The Company avers that the punishment of dismissal was appropriate and commensurated with the charges brought against the Claimant and was not excessive, considering the seriousness of his misconduct which undermined the Orderly System of Conduct and discipline of the Company.

The Claimant now comes before this Court to aver that his dismissal from employment was without just cause or excuse, was motivated by mala fide and was contrary to the principles of equity, good conscience and natural justice. He prayed to be reinstated to his former position without loss of seniority or otherwise together with arrears of salary.

The Issue:

The sole issue before the Court was whether the Company's action of dismissing the Claimant was with just cause or excuse.

The Law:

When dealing with reference under Section 20 of the Act, the first thing that the Industrial Court has to consider is the question of whether there was in fact, a dismissal. If this question is answered in the affirmative, it must only then go on to consider if the said dismissal was with or without just cause or excuse. Reference is drawn to the case of ***Wong Chee Hong vs Cathay Organisation (M) Sdn. Bhd. (1988) 1 CLJ 45; 1 CLJ (Rep) 298 (Federal Court) per Salleh Abas LP.***

In Colgate Palmolive Sdn. Bhd. v Yap Kok Foong (1998) 2

ILR 965 it was held as follows:

“In Section 20 reference, a workman's complaint consists of two elements. Firstly that he has been dismissed and Secondly that such dismissal was without just cause or excuse. It is upon these two elements being established that the workman can claim his relief, to with an order for reinstatement which may be granted or not at the discretion of the Industrial Court. As to the first element Industrial jurisprudence as developed in the course of Industrial adjudication readily recognizes that any act which has the effect of bringing the employment contract to an end is a “dismissal” within the hearing of Section 20. The terminology used and the means resorted to by an employer are of little significance, thus contractual terminations, constructive dismissal, non-renewals of contract, forced resignations, retrenchments and retirements are all species of the same genus, which is dismissal.”

Dr. Dunston Ayadurai in his text Industrial Relations In

Malaysia Law & Practice 3rd Edition at page 297 states:

“ A Workman can seek a remedy under Section 20 only if he had been dismissed. More often than not, there is no disputes that there was an actual dismissal of the workman by his employer. The only issue for the Industrial Court to determine is whether the dismissal had been for just cause or excuse. The onus of proving the existence of the same being cast upon the employer”

This onus or burden of proof on the employer is based on a standard of a balance of probabilities (See ***Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair & Anor (2002) 3 CLJ 314***).

The case of ***Goon Kwee Phoy v J & P Goats (M) Sdn. Bhd. (1981) 1 LNS 30*** is binding authority for the proposition that the Court is restricted in its inquiry into the veracity of the reason chosen by an employer for the dismissal.

It is trite that the requirement of good faith or bona fide is a vital factor to be considered in any dismissal. If the dismissal is thought to be a colourable exercise of Managerial authority to dismiss or as a result of unfair labour practice or discrimination, the Industrial Court is free to interfere and set aside such a dismissal.

The Evidence

That the Claimant was employed as a workman by the Company and was subsequently terminated from its service is clear from facts.

As the first requirement in this reference has been answered in the affirmative, now turn to the second – was the said termination for just cause or excuse.

The Company's Case

The Company called 3 witnesses on its behalf.

The first witness was one Goh Aik Lean (COW 1), the Company's Director and also holding the position of General Manager. COW 1 was the Chairman of the Domestic Inquiry. He testified that the Claimant had attended the Domestic Inquiry carried out on 22nd of February 2003 which continued on 24th of February 2003, 25th of February 2003 and was concluded on 26th of February 2003. He testified that the Claimant was given the opportunity to cross-examine the witness and to give evidence in his defence.

The Claimant never challenged the procedural impropriety of the Domestic Inquiry during the hearing.

COW 1 testified that he refused to give the Claimant a copy of the said Domestic Inquiry notes at the Domestic Inquiry because according to his understanding the Domestic Inquiry was part of the Company's internal documents and need not be supplied, nevertheless the Claimant

was given one hour to read the Domestic Inquiry notes. COW 1, further testified that the Claimant had signed at the bottom of each and every page of the Domestic Inquiry notes except the last page and he did not know why the Claimant refused to sign it.

Since neither the propriety nor otherwise of the conduct of the Domestic Inquiry issue touched or raised by the Claimant in their Submission the Company submitted that the Domestic Inquiry was indeed valid and the Domestic Inquiry notes were also accurate record of what transpired at the Domestic Inquiry.

The next witness was Mr. Chan Kwang Yik (COW 2). He is the Human Resources Manager of the Company. He testified that the Company had issued a show cause letter dated 5th of October 2002 to the Claimant after the Claimant had given his Transport Union Membership Card to the Company on 3rd of October 2002. It was solely due to the fact that the Claimant had given a false statement when answering question 4 in his application of Appointment form, COW 2 further testified that the Company did not take any disciplinary action nor terminate the Claimant's employment based on his false declaration.

COW 2 further testified that the Claimant was transferred to the Hand Sanding Section but Claimant's position had never been demoted and his salary was never reduced. He said the Claimant needed to do multiple tasks in addition to his normal job which was hand sanding. He also said that it was not a requirement in law to give any job description to employee.

The Company submitted that the said transfer was not actuated by any improper motives as the Claimant had himself admitted that he had agreed to carry out the hand sanding work without protest.

In his evidence the COW 2 had testified that a copy of the Company's Rules and Regulations had been given to the Claimant and the Claimant had acknowledged receipt of the same.

He further testified that on 29th of January 2003 at about 2.00 p.m. He was going to the toilet, he saw Mr. Tan Chee Boon (COW 3) coming into the main office at the reception area followed by the Claimant. He heard COW 3 telling the Claimant to stand outside the office but Claimant refused to move and stood inside the office.

He approached COW 3 and was told that the Claimant had scolded him and called him names at the production floor. He told COW 3 that Claimant could be charged for “biadap”. Immediately he heard the Claimant raise his voice and made a commotion by shouting “siapa biadap”, “kamu biadap” and “siapa buat biadap” in the office. COW 2 further testified that the Claimant was abusive and infuriated.

COW 2 warned the Claimant that he could be suspended but the Claimant shouted even louder “siapa biadap”. He immediately called the Security Guard to escort the Claimant out of the office and to wait at the guard house until he was served with a suspension letter. The Claimant continued shouting, “biadap punya orang”, “bodoh”, biadap even after the Security Guard tried to calm him down and requested him to go out from the office.

He further testified that before leaving the office he asked the Security Guard to write in the report book of the incident and instructed Miss Corine, the Company's Human Resources Executive to serve the Claimant the immediate suspension letter.

The third witness was Tan Chee Boon (COW 3). He was the Company's production Manager.

He testified that on 29th of January 2003 at 2.00 p.m., he was at the production floor, Hand Sanding Section block 'C'. He noted that the electric fan had been removed from the position that he had directed the worker to place it a few days earlier. He made the inquiry from the 2 Bangladeshi workers and was informed that the Claimant had disallowed them from using the fan. They also informed him that they wished to use the fan but they were afraid to do so as they had been threatened by the Claimant from doing so. He later instructed the two Bangladeshi workers to shift the fan back to original position. During the shifting of the fan he heard the Claimant raised his voice and condemned him aloud with the words “bodoh, ini semua kerja bodoh (2 times)”. The Claimant also further uttered the words “ kalau berani, bawa saya ke pejabat untuk berbincang”. Later, he asked the Claimant to follow him to the office and he told the Claimant to wait outside the office. He went into the office to meet Human Resources Manager, Mr. Chan Kwang Yik (COW 2).

Before he could finish his conversation with COW 2 the Claimant stepped into the office area.

He again told the Claimant to wait outside the office, instead the Claimant replied in a disrespectful manner “apa hal saya tak boleh masuk”.

He further testified that COW 2 told him “caj dia kelakuan biadap” and the Claimant immediately shouted “siapa biadap.... siapa biadap” subsequently he wrote the report of the incident (Pages 13 – 15 of COB).

COW 3 also confirmed that he was called as a witness at the Domestic Inquiry held on 25th of February 2003. He had signed at the bottom of the notes of Inquiry (pages 80 – 90 of COB).

The Counsel for the Company submitted that it has sufficiently discharged the burden of establishing that the Claimant's above misconducts constitute just cause or excuse for his dismissal and untainted by any unjust, unfair or wrongful labour practice. The Claimant had failed to rebut the Company's prima facie case established in the Domestic Inquiry.

The Company whereof that the Claimant's claim be dismissed.

The Claimant's Perspective

The Claimant was the sole witness for his case. It was in evidence that the Claimant was employed by the Company as charge hand on 3rd of October 1993 and was confirmed on the post on 1st of November 1993. The Claimant had served the Company for 9 years 7 months and his last drawn salary was RM766.50 permonth while in service with the Company, the Claimant was an active member of the Timber Employees Union Peninsular Malaysia, as he was serving as a Secretary of the Worksite Protem Committee.

The Claimant had admitted in his testimony that he was a member of the Transport Workers Union when he was formerly employed in Penang Yellow Bus Transport Company.

The Claimant submitted that he was the prime suspect and the Company had to take action against him before other workers are influenced by him to join the Union.

He further testified that the Company very subtly had begun to harass him firstly by transferring him to Hand Sanding Section without cogent reason. He never complained nor protested but continued to perform his duties as instructed by his superiors.

Subsequent to the above incident he was further harassed and intimidated by removing the fan from its original place whereby the flow of air from the fan would not reach him.

Subsequently he was issued by show cause letter, accusing of misconduct and suspended him indefinitely from work.

The Claimant promptly replied on 5th of February 2003 to all the 5 charges but the Company being dissatisfied with his explanation had fixed for a Domestic Inquiry on 22nd of February 2003.

Vide letter dated 4th of March 2003 the Company had terminated his employment with effect from the date of the said letter.

The Claimant denied that he did not at any time obstructed or disallowed the two Bangladeshi to use the fan on 29th of January 2003 at the Sanding Section. The Claimant testified that there were no complains from other workers in the said Section.

The Claimant testified that he was never rude to COW 3 even though he was severely intimidated by COW 3.

The learned Counsel for the Claimant submitted that the Claimant was docile and non-aggressive. He was calm and just followed the Security Guard to the guard house and waited there until he was given a suspension letter by Miss Corine and the Claimant signed and accepted a copy of the said letter in good faith.

The Claimant alleged that there was unfair labour practice and victimization by the Company against him. He prayed for an order that the dismissal be struck out as being without just cause or excuse and that he

be reinstated to his former position without loss of wages, seniority or benefits.

The Appraisal

In the case of ***Hong Leong Equipment Sdn. Bhd. v Liew Foh Chuan & others (1997) 1 CLJ 665 (Court of Appeal) Gopal Sri Ram JCA*** pronounced:

“The fact that an employer conducted a Domestic Inquiry against his workman, any judgement an entirely irrelevant consideration to the issue whether the latter had been dismissed without just cause or excuse. The findings of a Domestic Inquiry are not binding upon Industrial Court which rehears the matter afresh. However it may take into account the fact that Domestic Inquiry had been held when determining whether the particular workman was justly dismissed”.

And in ***Bumiputra Commerce Bank Limited v Mahkamah Perusahaan Malaysia & Anor (2004) 7 CLJ 77***. It was held that where as in the instant case the Domestic Inquiry has been conducted, the Court is

required at the outset to examine the inquiry notes and verify whether the inquiry was valid, whether the notes were accurate and whether a prima facie case has been made out against the Claimant.

In the instant case it appears that the Claimant was given the notice of inquiry and particulars of the charge against him. The record of the proceeding for the Domestic Inquiry were furnished in the Bundle of Documents. From it can be ascertained that the Claimant attended and participated in the Domestic Inquiry, in fact he was given the opportunity to examine the Company's witnesses and to be heard himself thereat. The accuracy of the notes was not challenged during the trial and hence this Court will take it as such.

However this Court is not bound by the findings of the Domestic Inquiry and will proceed to determine whether the Domestic Inquiry was valid and the prima facie case has been made out against the Claimant.

By careful scrutiny of the relevant evidence adduced in this case taken in its entirety based on equity, good conscience and on the substantial merits of the case it is the assessment of this Court that the

Company has established, on the balance of probabilities, sufficient evidence of misconduct on the part of the Claimant's.

The Court is of the opinion that the Domestic Inquiry was indeed valid and the Domestic Inquiry notes were also accurate record of what transpired at the Domestic Inquiry. It had established a prima facie case against the Claimant and the Claimant was unable to rebut the Company's prima facie case. It is pertinent to note that the Claimant was never dismissed based on his involvement as member of Union but was dismissed based on the misconducts as stipulated in the show cause letter dated 5th of February 2003 which he was found guilty by the panel members.

The testimony by COW 3 together with the written reports and the Domestic Inquiry statement of Ayub Khan and Iman Hoque pointed towards the same conclusion that the Claimant had obstructed and disallowed the 2 Bangladeshi workers to use the fan at the Hand Sanding Section. The Claimant dissatisfied with the facts that COW 3 had a few days ago instructed the fan to be removed from position (a) which is closer to him to position (b) to benefiting everyone pertaining to 2nd charge against the

Claimant, the Claimant himself has admitted he had used the words “Bodoh” and “Ini kerja orang bodoh”. This was heard by the Bangladeshi workers. These words were directed to COW 3, the Claimant’s superior.

As regards to the 3rd charge the Claimant himself admitted in his testimony that COW 3 had given him the instruction to wait outside the office first. However due to the Claimant own defiant act, he had nevertheless entered into the office guest hall on his own.

As to the 4th charge, the Claimant had admitted during the cross-examination and the Domestic Inquiry at COB page 120 that he did utter words “Siapa biadap, siapa biadap” very loudly. This unruly act was without reasonable excuse. This act of arrogance and recalcitrant attitude of the subordinates towards the Superior Officer.

It is obvious that the Claimant was abusive, infuriated and unruly at the Company’s office.

The Claimant’s misbehavior and unreasonable shouting had pierced through the quiet environment of the office.

The Claimant's insubordination is also not a single act of disobedience but rather continuous in nature from the Hand Sanding Section to the Human Resource office.

Under the circumstances and in view of this finding, or accusation of victimization by the Company against the Claimant must fail.

The Company has by the evidence that it adduced revealed that the Claimant's was guilty of the charges preferred against him. The said misconducts had indeed clearly breached the Company's Rules and Regulations which can be found at COB pages 13 – 14 such misconducts are tantamount to misconduct no. 12 "membantah dan enggan patuh perintah yang berpatutan and misconduct no. 24 "menimbulkan rusuhan, membuat huru hara atau menggacau bilau didalam kawasan Syarikat."

In short in the whole circumstances of this case the misconducts perpetrated by the Claimant entirely justified his dismissal.

It therefore follows that this is a case that does not require the intercession of this Court for and on behalf of the Claimant.

The Final Order

As the dismissal in this case have been found to be with just cause or excuse, the claim herein are hereby dismissed.

HANDED DOWN AND DATED THIS 22nd DAY OF JULY 2010.

**(DATO' HAJI SULAIMAN BIN ISMAIL)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
PENANG BRANCH.**